SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 820

R. L. HYER AND W. M. DAVIS AND SON COMPANY, A CORPORATION,

Petitioners,

vs.

BENJAMIN H. ROTH, ET AL., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF B. H. ROTH AND COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES P. DICKINSON,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

R. L. Hyer and W. M. Davis and Son Company, a Florida corporation, present this petition for writ of certiorari to review a decision of the Circuit Court of Appeals for the Fifth Circuit, and show unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

In this statement petitioners will be referred to as defendants, and respondents referred to as plaintiffs, and on this we proceed.

The plaintiffs in this case are residents of the City of New York and they form a co-partnership under the name of B. H. Roth and Company, the individuals being B. H. Roth, Jerome Roth and Milton C. Zaidenberg.

The defendants are residents of Orlando, Orange County, Florida, that is, R. L. Hyer is, and the corporation, W. M. Davis and Son Company, is a Florida corporation with its principal place of business at Orlando, Florida, and all the officers and directors reside there.

The defendants owned a claim in the amount of $68,629.77 proven and allowed in the bankruptcy proceedings of United Cigar Stores Company of America.

Plaintiffs claim that defendants agreed to sell their claim to them for 75¢ on the dollar and refused to do so and the suit is for damages for breach of the alleged agreement to sell the claim.

Pleadings.

The allegations of the first count which is solely against the defendants R. L. Hyer and W. M. Davis and Son Company, a corporation, succinctly allege that a firm of attorneys in New York City of which Walter G. Schelker, Jr., was a member, represented the defendants, including the wife of R. L. Hyer, in establishing a landlord's claim against the estate of United Cigar Stores Company of America in the amount of $68,629.77 and that about March 30, 1937, plaintiffs made an offer to purchase the claim for 75¢ on the dollar, said offer being made to Walter G. Schelker, Jr., who transmitted same to Charles P. Dickinson, Orlando, Florida, who was the attorney, and allegedly the agent of the owners of the claim, and that Dickinson afterwards advised Schelker that the owners were ready and willing to accept the same, and that Dickinson authorized, in his capacity as agent, Schelker to consummate the transaction

and that Schelker thereupon wrote the letter and delivered it, dated March 31, 1937, and attached as Plaintiffs' Exhibit A, and that all the conversations and transactions were in New York State, except communications between Dickinson and Schelker, and that was on long distance telephone between New York and Florida. The count then alleges the refusal of defendants to carry out the alleged agreement and a breach thereof. It then alleges plaintiffs' claim for damages based on so much stock and cash which was to be received when and if a reorganization plan was ever approved and makes and lays the claim for damages entirely on the future issuances and delivery of securities under the plan together with $250 cash on each $1,000, and alleges that by reason of this set up plaintiffs had lost about $23,000.

Second Count.

The second count is not materially different from the first count and alleges only other matters different from the first count so as to make a claim against Charles P. Dickinson, who is made a party to that count in order to recover from him for false representation or implied warranty of agency. See R. 1 to 8.

The letter referred to as Exhibit A is set out on record page 8 and confirmed a telephone conversation, states who the owners are and states the purchase price to be in cash, payable on delivery of assignment, and states the understanding of the writer that the addressee "will forward me assignment form you will require."

Defendants' Defenses.

By reference to the record, pages R. 9 to 15, the defendants answered the two counts separately, briefly as follows:

(a) That the only power of attorney they ever executed was to D. R. Dills and Walter G. Schelker, Jr., to prosecute

their claim in the bankruptcy proceedings, and sets out the power of attorney as follows:

> "Claimants appoint D. R. Dills and/or W. G. Schelker, Jr., or their representatives, the proxy and attorney-in-fact of each of them, with full power to attend any meeting or meetings of claimants of the debtor, or any adjournment or adjournments thereof, and for said claimants, and in said claimants' name to vote for or against any proposal or resolution that may be submitted to claimants in the proceedings had in the petition hereinbefore filed, and to accept or reject any offer in re-organization made therein; and, in addition, to receive payment of dividends or monies due said claimants in the within proceedings, and under any plan of reorganization therein effected;"

and alleges that they executed no other power and all the authority either had was contained in the foregoing, and alleged that they have no knowledge or information sufficient to form a belief as to the truth of any conversation between Schelker and Zaidenberg in regard to any offer, and also as to the communication between Schelker and Dickinson and deny that Dickinson was ever the agent of the defendants in any manner whatsoever in regard to said claim or the law firm of Dickinson and Dickinson. They further say that they are without knowledge or information sufficient to form a belief as to the truth of the communication or discussion between Dickinson and Schelker in regard to the claim and advices that Dickinson gave Schelker, or any discussion between Schelker and Dickinson in regard to the offer for the claim, and, in fact, any communication whatsoever between Dickinson and Schelker, and further deny the oral conversation between Zaidenberg and Schelker and have no information or knowledge of the letter, deny the letter, and deny authority for the letter, and in fact deny the whole allegations of the count and also the damage.

(b) Further defendants pleaded the statute of frauds, R. 13, in two paragraphs, first under the Florida statute, and second, under the New York Statute.

Second Count.

Defendants pleaded all the same matters to the second count and then specifically denied all of the other allegations in Count No. 2.

Trial.

The trial was had in the District Court before the Court, no jury having been requested, as provided by Rule 38 Rules of Civil Procedure.

Testimony.

The evidence was substantially as follows: Plaintiffs called Defendants, who testified that C. P. Dickinson, their attorney, told them Schelker in New York had phoned him some one wanted to buy their claim at 75% of face value, and a reorganization of United Cigar Stores of America was out and creditors were to get no cash, but only securities at rate of $250 in bonds on each $1000, 5½ shares preferred stock paying $5.00, and 150 shares common stock. That whatever papers were to be signed must be approved by them and their attorney, C. P. Dickinson, and they would not warrant anything, but only quit claim, and they would let no one sign for them and must see what they sign before selling. (R. L. Hyer R. 102, 123, 167) (W. M. Davis, Jr. 154, 162, 168) Two days later Dickinson sent for them, defendants, and told them he had a form of assignment sent down from New York by Schelker, and read it to them, and it contained warranties and other matters, they would not sign. (R. L. Hyer R. 102, 123, 167;) (W. M. Davis Jr. 154, 152, 168;) (R. 215, form of assignment sent down by Schelker). Dickinson prepared and sent to Schelker for them form of

assignment with instructions to wire him if it was agreeable to plaintiffs. (R. 100 and 97, form of assignment sent by Dickinson to Schelker.) Schelker had told plaintiffs the form of assignment would have to be approved by defendants and their counsel in Orlando. (R. 57 and 58 and 71, Schelker's testimony). Plaintiff refused to agree to form prepared by Dickinson and referred Schelker to their attorney, who entered into a lengthy argument, as to the merits of each form, only to be told by Schelker that defendants would not sign the one he sent down at plaintiffs' request (R. 68, 69). Then Defendants learned there was to be paid to creditors in addition to the securities $250 in cash and had Dickinson to notify Schelker they would not proceed further in the matter (R. 101 Dickinson's letter calling off deal), and Schelker notified plaintiffs before they had accepted the form of assignment prepared by Dickinson (R. 68, 69). In the meantime Schelker on the communication from Dickinson had telephoned Plaintiffs that Defendants had accepted their offer of 75% and he was to prepare the forms of assignment and was informed by Plaintiffs they would have to use their own printed forms, whereupon in the same conversation Schelker told Plaintiffs the forms would have to be approved by Defendants and their counsel in Florida, but Plaintiffs deny this (R. 57 and 58 and 71, Schelker's testimony, and R. 127). At Plaintiffs' request, Schelker, unknown to Defendants or Dickinson, wrote plaintiffs a letter confirming the telephone conversation, stating price 75%, payment in cash, and asking forms be sent, but he was not making an agreement but only fixing the price, (R. 8, letter March 31, 1937, and R. 71, 72, on no agreement). Plaintiffs replied by letter and fixed payment by sight draft on delivery at their office in New York, on April 2nd, 1937, (R. 95, 96). Defendants intended to close in Orlando, or have Dickinson go to New York to handle matter, (R. 108, R. 100). Plaintiffs knew Schelker was only

attorney and must communicate matters to Florida, and plaintiffs did not hear of Dickinson until early 1939, (R. 203, 206), and did not rely solely on Schelker's letter, as their contract, or basis of their claim in the suit (R. 175). There was never any direct communication between Plaintiffs and Defendants, or between Plaintiffs and Dickinson, or between Schelker and Defendants in regard to the matter.

Schelker says he told Dickinson that there was to be $250 cash in addition to securities to go to creditors on each $1000 of claim, and that Dickinson told him to consummate the deal (R. 47, 48). Dickinson did not testify. There is no evidence that Defendants or Dickinson had ever heard of Schelker's letter of March 31, 1937 (R. 8), Roth's reply (R. 95), or any conversations between Schelker and Plaintiffs any time before Defendants stopped negotiations. Nothing was paid to bind the bargain, nor were the goods or any part delivered, nor was any note or memorandum signed by Defendants, or by their agent duly authorized thereunto.

For his authority to write letter of March 31st, 1937, Schelker says that it was based on a course of conduct; that he was counsel for claimants in establishing their claim, being employed as associate of C. P. Dickinson, and he had kept up with the market on claims, that he had submitted several offers to Dickinson, (and he, Dickinson, had submitted them to his clients—Pure hearsay), and rejected, and he communicated the Roth offer in the same course of conduct (R. 50). There is no evidence any other proposition was ever submitted to Defendants through Dickinson and Schelker.

District Court's Findings, R. 218-227.

The District Court found as facts:

1. The subject matter of the contract was within the Statute of Frauds, and the Statute must be complied with (R. 219).

2. Letter of March 31st, 1937, under all the testimony was no compliance with Statute of Frauds (R. 219).

3. Parties' minds did not meet, because Defendants had made it a condition of disposing of the claim, that there was no cash to go to creditors under plan of reorganization as told them and it turned out the plan called for $250 cash on each $1000 in addition to securities (R. 219).

4. That the minds of the parties never met on the form and substance of the assignment of the claim (R. 220).

5. That, even if Schelker had been authorized to write letter of March 31, 1937 (R. 8), Plaintiff's reply varied from it in substantial particulars, and was not unconditional (R. 221).

6 and 7. That the negotiations were partly oral and partly in writing and Statute of Frauds had not been met (R. 221, 222).

8. That certain essential terms of the negotiations were omitted from the letter March 31st, 1937, and plaintiffs well knew they were omitted, and that Schelker did not intend by his letter aforesaid to make a contract (R. 222).

9. That Schelker had not been shown to have any authority to sign a memorandum in writing to bind the defendants to sale of their claim (R. 222).

10. The Court did not go into the matter of damages (R. 223).

11. The Court found that defendants never had any knowledge of the letter of March 31st, 1937, and did not ratify same (R. 223).

12. The Court did not find on point of agency of C. P. Dickinson (R. 226).

Judgment was entered for Defendants.

The Circuit Court of Appeals reversed the judgment January 15th, 1943 (R. 248), and denied Petition for Rehearing February 12th, 1943 (R. 263), and has by its order stayed the mandate until March 17th, 1943 (R. 271), Circuit Court of Appeals' opinion (R. 239).

B.

Reasons Relied Upon for Allowance of Writ.

1. The Circuit Court of Appeals has decided an important question of local law in conflict with a local Statute of Florida, and in conflict with the decisions of the Supreme Court of Florida, in a case arising under Florida law.

2. The Circuit Court of Appeals has refused to accord to the decision of a District Court the law in Section 773, Title 28 U. S. C. A., and Rule 52 (a), Federal Rules of Civil Procedure, and has set aside the findings of facts of the District Court, and substituted its own findings of fact and passed on the credibility of witnesses.

3. The Circuit Court of Appeals has in effect decided a Federal question contrary to the decisions of this Court.

C.

Precise Questions Involved.

1. In the case of sales of personal property, should not the law of the seller's domicile control as to the validity of any contract of sale, and the essentials thereof?

2. In a case tried before a United States District Court without a jury, where the whole case is merely one involving disputed facts, is the Circuit Court of Appeals authorized under the applicable Federal Statute and court rule to set aside the District Court's finding of facts, and itself pass on the credibility of witnesses and set aside the findings of the lower court amply supported by the evidence?

D.

Prayer for Writ.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that Court to certify and send to this Court on the day to be designated, full and complete transcript of the record and all proceedings in the case entitled Benjamin H. Roth, Jerome Roth and Milton C. Zaidenberg, co-partners, doing business under the firm name of B. H. Roth and Company, appellants, *vs.* R. L. Hyer and W. M. Davis and Son Company, a corporation, appellees, being case No. 10255, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be reversed and that Petitioners be granted such other and further relief as may seem proper.

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